PERSPECTIVES

Ian F. Fletcher*

International Insolvency: A Case for Study and Treatment**

Suppose that a bank, incorporated under the law of state *A*, pursues international operations by means of branches established in numerous different countries. Accounts are maintained with different branches of the bank by customers, some of whom are based in the same country as the branch in question, while others are based outside that jurisdiction. The branches also engage in lending transactions to various parties from inside and outside their states of operation. Some of the loans are secured, others are not. Some of the accounts and lending transactions involve sovereign states or their public and governmental authorities as parties. Other transactions are with multinational corporations, while yet others are with small companies and private individuals. Assets and liabilities are thus widely dispersed throughout the world and are subject to the laws of many different countries, as too are the various transactions to which the bank and its branches are parties.

Suppose also that the regulatory authorities in some jurisdictions in which the bank is operating become concerned at apparent irregularities in the way in which its business is being conducted. Investigations result in the compulsory suspension of the bank's operations in some countries (but not in all), and it quickly transpires that the bank is massively insolvent on a global basis. Within some jurisdictions, however, the local branch of the bank happens to be in surplus.

Legal issues that must be resolved in the above case include whether insolvency

*Professor of Commercial Law, Centre for Commercial Law Studies, Queen Mary and Westfield College, University of London.

**This article derives from a paper that the author presented at the First Asian Conference on International Banking, held in Taiwan, Republic of China, in June 1992.

proceedings can or should be commenced in all the jurisdictions in which the bank has been operating, or whether they can be coordinated in a selective manner from perhaps one or two "key" jurisdictions. Also, at issue is whether a unified collection and distribution of the bank's assets among all those with claims against it can take place, or whether assets and liabilities will in practice have to be administered on a state-by-state basis due to the practice known as "ring-fencing." Furthermore, if multiple proceedings are taking place in parallel, what possibilities exist for devising some kind of collaborative arrangement between the officeholders concerned?

The problems generated by international insolvency are not solely confined to the sphere of international banking, nor are they particularly new in the experience of private international lawyers. Attempts to construct theoretical models for the solution of these problems have been made in the past, but they have generally failed to commend themselves at the practical level. On the other hand, the difficulty of obtaining wide-scale international agreement to any but the most limited of practical proposals for cross-border collaboration quickly becomes obvious in face of the divergent national laws regarding credit, security, and insolvency, which penetrate deeply into the socioeconomic bedrock of the sovereign states concerned. The reluctance to turn over assets to be administered abroad according to a different insolvency law regime is understandable. The challenge posed by these issues has become particularly acute in recent years. Consequently, this article considers the efforts currently being made at national and international levels to find workable solutions to some of the most notorious difficulties commonly encountered.

I. The Main Ingredients of the International Insolvency Problem

The issues that present themselves in the imaginary case outlined above are the consequence of the great diversity that exists between the sovereign legal systems of the world, both in their domestic laws of credit, security, and insolvency, and in their rules of private international law applicable to these same matters. Because of the intimate correlation between the national laws governing creditors' rights and remedies, and the commercial practices that develop in reliance upon them, a debtor's estate might under some circumstances be administered according to the insolvency laws of a foreign country. This possibility gives rise to a serious likelihood of defeat or diminution of the settled expectations of creditors whose dealings with the debtor were based upon assumptions that the laws that would regulate their relationship were those of their local system.

The law of the place where insolvency proceedings are opened, the *lex concursus*, will in most cases be applied to determine the majority of the issues that arise in the course of those proceedings. These issues include the extent to which certain creditors may enjoy preferential status for their claims against the debtor; the validity and extent of any rights of secured creditors asserted against property otherwise comprised within the insolvent debtor's estate; and the ultimate extent of the assets that make up that estate.

The established principle of territorial limitation to the operation of laws has the consequence that the law of the *forum concursus* is only applicable *proprio vigore* to property and persons within the territory of the sovereign state whose jurisdiction is asserted. Any effects of a more universal character, concerning persons or property not presently amenable to the direct power and control of the legal order of the *forum concursus*, are inevitably dependent upon the willingness of the foreign legal system, within whose jurisdiction the ultimate acts of enforcement would take place, to recognize the validity of the insolvency process opened in the *forum concursus*, and to respect and support its claim to operate in this way. Under any set of circumstances, the extent to which this can be accomplished is determined by the cumulative application of the rules of private international law applied by each of the states within whose jurisdiction any aspect of this process has to take place. If any of the concerned jurisdictions declines to recognize the validity or extraterritorial effectiveness of the original proceedings, any property located within the territory of the nonrecognizing state will generally be rendered inaccessible to the liquidator appointed under the *lex concursus*. Hence, such property will be susceptible to alternative claims maintained via proceedings under the law of the situs. Such claims may be brought by individual creditors (typically, local parties from the jurisdiction in question, but possibly from outside that state) who by seeking to bypass the collective distribution process of the insolvency procedures hope to maximize their personal levels of recovery through direct enforcement involving specific assets.

The practice described above—sometimes termed "ring-fencing of assets"—is made possible by the absence of any internationally standardized rules to govern the international insolvency process. No global and commonly accepted principles exist to regulate the exercise of jurisdiction in insolvency matters, particularly in relation to the according of international recognition and effect to insolvency proceedings opened on any specific jurisdictional basis. Generally, the laws of a state will provide for its courts to exercise insolvency jurisdiction over any company formed and registered under the laws of that state.[1] In addition, various rules may be used (differing from one system to another) to enable insolvency proceedings to be commenced in relation to foreign companies, that is, those not formed and registered under the laws of the *forum concursus*.[2] These cases can range from the exercise of jurisdiction on the basis of a relatively substantial

1. For the English law provision to this effect, see Insolvency Act 1986, ch. 45, § 117(1) (available in HALSBURY'S STATUTES 717, 798 (1991)).

2. For English law, the relevant provisions are currently contained in part 5 of the Insolvency Act 1986, and in the case law concerned with the application of its provisions in their present and former statutory enactments. For extended accounts of the subject, see IAN F. FLETCHER, LAW OF INSOLVENCY pt. III (1990) (especially chs. 28 & 29); P. ST. J. SMART, CROSS-BORDER INSOLVENCY

association between the foreign company and the state in question (for example, through doing business within that state, or through the maintenance of a branch or established place of business there);[3] or through a less substantial jurisdictional criterion, such as a "presence of assets" test[4] (even where the assets in question are of small, or even nominal value); or on an exorbitant ground such as an allegation that the company owes a liability to a citizen of the forum (for example, under articles 14 and 15 of the French Civil Code).

Exercise of insolvency jurisdiction over foreign companies can have a valid basis, particularly where the state of incorporation is a jurisdiction of convenience or one with which the company, once in being, has little or no functional connection. Nevertheless, no common framework of rules at present regulates the exercise of jurisdiction in these matters. It may well be that due to the circumstances of its operation a company may be simultaneously amenable to the insolvency jurisdiction of a plurality of different states. If such a company becomes, or is suspected to be, insolvent, concurrent proceedings may be commenced. However, no machinery is presently in place to ensure that such proceedings are either coordinated or consolidated. Hence, in all likelihood certain assets, particularly those located in jurisdictions where no proceedings have been opened, will become the subject of competing claims lodged by various parties. Such parties may include different liquidators purporting to represent the body of creditors proving claims in the proceedings under which their respective appointments have been made, and also perhaps individual creditors hoping to improve their final position by acting outside the collectivized framework of such proceedings.[5]

The outcome of such a "race of diligence" as is described above will depend upon the private international law rules of each state in which the race is run. Some states have adopted the "territorial" view of insolvency, and consequently refuse to accord recognition to any foreign proceedings concerning property or persons within their own jurisdiction. States belonging in this category include the Netherlands,[6] Sweden,[7] and Japan.[8] Germany also subscribed to this approach

(1991); LOUIS JACQUES BLOM-COOPER, BANKRUPTCY IN PRIVATE INTERNATIONAL LAW (1954), *reprinted in* Louis Jacques Blom-Cooper, *Bankruptcy in English Private International Law—III,* 4 INT'L & COMP. L.Q. 170 (1955).

3. *See, e.g.*, Re A Company ex parte Nicholas, No. 002470 of 1988, [1991] BUTTERWORTHS COMPANY LAW CASES 480; International Westminster Bank P.C. v. Okeanos Maritime Corp., [1987] 3 All E.R. 137.

4. *See, e.g.*, Banque des Marchands de Moscou (Koupetschesky) v. Kindersley, [1951] 1 Ch. 112 (C.A.); Re Compania Merabello San Nicholas S.A. [1973] 1 Ch. 75.

5. *Cf.* Kurt H. Nadelmann, *The Lure in 'International Bankruptcies' of Assets Located Abroad,* 33 INT'L & COMP. L.Q. 431 (1984); H. Hanisch *in* CROSS-BORDER INSOLVENCY: COMPARATIVE DIMENSIONS (THE ABERYSTWYTH INSOLVENCY PAPERS) ch. 11. (Ian F. Fletcher ed., 1990).

6. *See* J.H. Dalhuisen *in* CROSS-BORDER INSOLVENCY: NATIONAL AND COMPARATIVE STUDIES ch. 10 (Ian F. Fletcher ed., 1992) (see especially pp. 190, 196–98).

7. *See* Michael Bogdon *in* CROSS-BORDER INSOLVENCY: NATIONAL AND COMPARATIVE STUDIES, *supra* note 6, ch. 11 (see especially pp. 206–14).

8. *See* Makoto Ito *in* CROSS-BORDER INSOLVENCY: NATIONAL AND COMPARATIVE STUDIES, *supra* note 6, ch. 9 (see especially pp. 180–81, 182–83).

until as recently as 1985.[9] Assets located in such a jurisdiction remain vulnerable to the claims of individual creditors, and hence the prospects for ring-fencing are maximized.

Outside the "territorialist" camp, the majority of states accord some degree of recognition to foreign insolvency proceedings. However, the differences are wide regarding the grounds on which they will do so (having regard to the circumstances in which jurisdiction was exercised in the *forum concursus*), and regarding the consequences and effects that follow from such recognition. Therefore, the possibility exists that, although a state may accept in principle that a foreign liquidator is entitled to lay claim to assets located within its jurisdiction, the state may nevertheless withhold recognition in a given case because of the circumstances under which the foreign proceedings have been opened. Hence, even in nonterritorialist states, opportunities for ring-fencing may arise in practice. This is a matter capable of being exploited by individual creditors, to the extent that it can frequently cease to be cost-effective for a liquidator to repatriate assets from certain locations. The principle of equal treatment for all creditors in the event of the debtor's insolvency therefore breaks down in cases of international insolvency, because of the historic inability of private international law, as traditionally practiced, to provide a consistent and standardized set of rules to which all sovereign states subscribe in common.

The authors of theoretical treatises have often advocated an idealized solution based on the twin principles of unity and universality of insolvency. This solution insists that only one forum of bankruptcy should be available for a given debtor. Advocates maintain that proceedings opened there would be administered according to the provisions of the insolvency law of the *forum concursus*, but should have full effect in relation to all assets wheresoever located, and with regard to all parties with claims against the estate, or indebted to it, regardless of their personal whereabouts. Under current circumstances, the nations of the world show no sign that they are prepared to endorse and apply such a solution. Complete agreement is unlikely even as to the criteria that would determine the proper forum for insolvency in cases where a debtor's activities had given rise to substantial contacts of various kinds with a plurality of jurisdictions. Without total clarity about this fundamental matter, so that parties dealing with a debtor are able at all times to identify the whereabouts of that party's proper forum of bankruptcy, there will be abundant potential for injustice through defeat of creditors' reasonable expectations as to the venue for any insolvency proceedings that might involve the debtor, and as to the system of law by which such proceedings would be governed.

9. *See* H. Hanisch *in* CROSS-BORDER INSOLVENCY: NATIONAL AND COMPARATIVE STUDIES, *supra* note 6, ch. 6 (see especially pp. 107–10, 114–17, and cases there cited, notably Judgment of July 13, 1983, BGH [Supreme Court], 88 Entscheidungen des Bundesgerichtsofes in Zivilsachen [BGHZ] 147, and Judgment of July 11, 1985, BGH, 95 BGHZ 256).

Therefore, the prospect of any complete solution to the problems of international insolvency in the form of a body of uniform legal rules accepted and applied on a global basis is almost impossibly remote at the present time. The motivations to study these problems and to discover workable solutions that are also realistically capable of being accepted by a significant number of the world's sovereign states must come from the awareness by those engaged in international banking and commerce of the economic cost of continuing with the current, unregulated state of affairs. In this author's view, every effort should be made to promote international study and discussion of these problems in the search for the optimum solutions attainable under existing circumstances. What follows, therefore, is an analysis of what has recently been achieved, and what is presently being attempted, in this area, commencing with the case of the Bank of Credit and Commerce International (BCCI), on which my introductory scenario was closely modelled.

II. Approaches and Solutions

A. The Practical Response

Insolvency practitioners have to take the world as they find it and make the best of it. As much as anything, the solutions they arrive at are not unlike a business deal concluded between the interested parties by direct negotiation, with the courts only being involved at strategic stages to provide requisite support to what is being attempted, or to sanction that which has been accomplished. One notable illustration of this kind of process is provided by the BCCI affair (the outcome of which is still delicately poised at the time of writing).[10] The BCCI group of banking companies operated in sixty-nine countries through over 250 branches. The group's corporate organization consisted of three principal entities, two of which were incorporated in the Grand Duchy of Luxembourg, and the third incorporated in the Cayman Islands. The activities of the three companies were so commingled that to separate them for liquidation would in itself have entailed a complex and costly legal and accounting exercise. The collapse of the group occurred in July 1991, after the Bank of England exercised its regulatory powers to close down the bank's operations in that country. Prior to the collapse, a controlling interest in the shares of BCCI (in excess of 70 percent) had been acquired by the Government of Abu Dhabi.

Although as recently as the end of 1989 the audited accounts of BCCI had valued its worldwide assets at $23.5 billion, the crude position at the end of June 1991 was that the realizable value of its assets was a mere $1.4 billion, to be set against total estimated liabilities of $10 billion. The basic arithmetic therefore

10. I.e., Oct. 1992.

suggested that if a global pooling of assets and liabilities took place, the return to creditors would be, at best, in the order of 10 percent. But at the outset, no guarantee existed that such a pooling would take place. The dispersal of the assets across seventy or more sovereign jurisdictions, if matched by multiple local attempts at ring-fencing, would unleash a decade or more of litigation from which only the lawyers and accountants could be certain to reap any financial gains.

Despite the obvious delicacy of their position in purely legal terms, the provisional liquidators, together with their legal advisers, succeeded in performing a remarkable feat of creativity and improvization, for which the judiciary in at least four separate states can take a goodly share of the credit. During the final days of 1991 and the early days of 1992, a coordinated sequence of judicial proceedings and judgments in Luxembourg, the Cayman Islands, London, New York, and Washington[11] provided a workable basis for the liquidations of the three BCCI companies to be undertaken together by a team of liquidators. The liquidators were mainly drawn from one large firm of accountants, Touche Ross, whose own international organization could for the most part match the demands of the task in terms of skills and resources. At the same time, the liquidators concluded an agreement with the Government of Abu Dhabi that would provide for an additional contribution to the assets. The anticipated effect would be to boost the rate of return to creditors to between 30 percent and 40 percent of their claims, as against the range of 0 percent to 10 percent otherwise in prospect. A further, important feature was that these payments would be made at a far earlier date than could otherwise occur. This cash injection was conditional upon acceptance by at least 70 percent of all creditors of the comprehensive scheme, known as the Pooling Agreement, whereby all creditors worldwide would receive the same level of dividend on their admitted claims. The liquidators would determine and pay preferential claims according to the terms of English insolvency law. Then they would transmit the balance to be dealt with in Luxembourg in accordance with the liquidation law of that country. For some time, indications were that the required number of acceptances by creditors might not be obtained. Some creditors were unwilling to forgo the right to take proceedings against the majority shareholder, which they were required to relinquish as part of the terms of the Pooling Agreement. They urged that further efforts should be made to negotiate a substantial increase in the sum to be paid by the Government of Abu Dhabi in return for the waiver of any possible claims against it regarding the way in which BCCI affairs were managed. By October 1992, however, over 90 percent of the

11. *See* Re Bank of Credit and Commerce International S.A., (No. 2) [1992] British Company Cases 715 (C.A.); Judgment of Jan. 3, 1992, District Court of Luxembourg, Sixth Chamber (1431.12P) (M. Welter, V.P.); United States v. BCCI Holdings (Luxembourg), S.A., No. CR 91-0655, 1992 U.S. Dist. LEXIS 676 (D.D.C. 1992).

creditors, voting by postal ballot, had signified their acceptance of the scheme embodied in the Pooling Agreement.[12]

If the Pooling Agreement is successfully implemented, it will represent a remarkable triumph of ad hoc, cross-border cooperation, accomplished despite the absence of any formal international provisions to impart leverage to the elaborate process of negotiation. What has manifestly dominated the thinking of the key participants—the officeholders, the judges, and the lawyers—has been the desire to hold together such residual value as was left in the BCCI assets, and to maximize the proportion of that which is to pass to the creditors by way of dividend. In all likelihood, given the uncertain and unregulated state of international insolvency, any outbreak of the traditional "race to the courthouse" practices in so complex a case would merely ensure that no dividend was distributed before the end of the century, and possibly not at all.

What is in prospect, if all goes as planned, is that the outcome of the BCCI insolvency will correspond to the "theoretical ideal" for cases of international insolvency, namely, a unitary process of administering the estate based upon the principle of equality of treatment for all creditors. It is a tantalizing paradox that this "holy grail" of international insolvency—unity and universality of insolvency administration—will have been achieved (if indeed this comes about) virtually because of the chaotic and wasteful alternative scenario that confronts the creditors if they reject the package deal offered to them. This kind of arrangement, in which many millions of dollars' worth of professional fees and expenses have been incurred in the negotiating process, might well not be attainable in a case where the asset values are much smaller, or where the bargaining equation lacks the element to match that constituted by the Government of Abu Dhabi in the BCCI imbroglio. The positive lesson that should be drawn from what has occurred is the clear evidence of a spirit of judicial activism, combined with a sense of the internationalist objectives to be pursued, awake and waiting to be invoked in many jurisdictions of the world. This is something on which to build in the future, and in actual cases may well deliver results superior to those that might be attainable through the process of negotiating and implementing international treaties. This article now considers these two lines of development in turn, beginning with developments in treaty making.

B. The Multilateral Response

Historically, bankruptcy treaties have been relatively few in number when considered in the context of the number of states in the world, and of the numbers of treaties concluded in furtherance of common commercial interests. The major-

12. Neil Bennett, *Court Will Rule on BCCI in Two Weeks*, THE TIMES (London) Oct. 8, 1992, at 21 (reporting proceedings before the Luxembourg District Court in which the liquidators sought an order formally approving the scheme with binding effect).

ity of those bankruptcy treaties have been bilateral ones.[13] Very few multilateral treaties of this kind have been successfully attempted, although various projects have been undertaken from time to time. The only modern examples of multilateral bankruptcy treaties currently in force are the Nordic Convention of 1933,[14] the Montevideo Treaties of 1889 and 1940,[15] and the Havana Convention of 1928.[16] Each of these is notable for its special, regional characteristics. Each involved states that are not only geographical neighbors, but also have close affinities in their legal traditions, and in cultural, linguistic, and political matters. The indications are that these treaties work satisfactorily in their regional settings, but they can at best supply only a partial solution to the problems of any insolvency in which the spread of contacts extends beyond the regional frontier.

In Europe south of Scandinavia, where legal and linguistic diversity abounds, initiatives for the creation of insolvency treaties have met with repeated failure until very recently. Most conspicuous was the failure of the Member States of the European Community, during twenty years of negotiations until the early 1980s, to conclude such a treaty, despite the obvious incentive and necessity resulting from their special commercial association. The first EC Project for a Bankruptcy Convention (EC Project) was an overambitious model, afflicted by serious internal inconsistencies that threatened to render it unworkable in practice. A particularly unsound aspect was the discriminatory effect of some of its provisions as between parties based inside the frontiers of the Community and those from outside. The EC Project failed to respect the fundamental principle of equality of treatment for all creditors.[17]

In the wake of the collapse of the EC Project, the Council of Europe, the other major grouping of European states, began a fresh initiative. The Council of Europe now has a membership of over twenty-four states, including all of the twelve current members of the EC. At the same time, it operates as a looser organization with regard to its Member States' commitment to ratify and implement the treaties or conventions concluded under its auspices. A mood of caution

13. For a survey of the history of such treaties since 1715, see Kurt Lipstein *in* CROSS-BORDER INSOLVENCY: COMPARATIVE DIMENSIONS (THE ABERYSTWYTH INSOLVENCY PAPERS), *supra* note 5, ch. 14. See also J.M. Dobson, CROSS-BORDER INSOLVENCY: COMPARATIVE DIMENSIONS (THE ABERYSTWYTH INSOLVENCY PAPERS), *supra* note 5, ch. 15, for an account of Latin American treaties. *See also* Kurt Nadelmann, *Bankruptcy Treaties,* 93 U. PA. L. REV. 58.

14. Convention Between Denmark, Finland, Ireland, Norway and Sweden Regarding Bankruptcy, Nov. 7, 1933, 155 L.N.T.S. 133. *See* Bogdan, *supra* note 7, at 214, *reprinted in* Michael Bogdan, *International Bankruptcy Law in Scandinavia,* 34 INT'L & COMP. L.Q. 49.

15. For the text, see 37 AFR. J. INT'L L. SUPP. 149 (1943). For comments, see Lipstein, *supra* note 13, at 228-29 and Dobson, *supra* note 13, at 237-48.

16. Convention on Private International Law, Feb. 20, 1928, 86 L.N.T.S. 246, 254. For comments, see Lipstein, *supra* note 13, at 229-30 and Dobson, *supra* note 13, at 249-62.

17. For detailed analysis of the first EC Project, see IAN F. FLETCHER, CONFLICT OF LAWS AND EUROPEAN COMMUNITY LAW ch. 6 (1982), and also Ian Fletcher, *The Proposed Community Convention on Bankruptcy and Related Matters,* 2 EURO. L.R. 15 (1977), and D. LASOK & P. STONE, CONFLICT OF LAWS IN THE EUROPEAN COMMUNITY ch. 10 (1987).

is therefore advisable with regard to the apparent breakthrough that was achieved when, in June 1990, the Council of Europe's Convention on Certain International Aspects of Bankruptcy was opened for signature in Istanbul.[18] To date only seven states have signed the Convention, and none of those have yet ratified it. A minimum of three ratifications is required to bring it into force even among the states that accept it.[19] The U.K. Government has so far given no indications whether it intends to become a party to the Istanbul Convention; its policy seems to be one of "wait and see."

Is the Istanbul Convention of much practical value? The answer must be potentially affirmative if certain conditions are met. Those conditions are that a sufficiently large number of commercially significant states adopt it—provided that they do not also take advantage of the in-built facility to enter reservations so as to disapply most of its main provisions with respect to themselves![20] On the other hand, if the contents of chapters II and III are kept in play among the ratifying states, a liquidator or trustee appointed in proceedings in one state could swiftly move to secure, and later administer, assets located in those other states that are parties to the Convention. The effective date from which the liquidator is enabled to exercise his powers in other jurisdictions is the date of his original appointment,[21] which is a vital precondition to his being able to counteract the advantages that local creditors traditionally enjoy in the race to seize and retain local assets.

The Convention is also realistic in accepting that, so long as national laws on preferential or secured claims differ from one another in ways that are material, local creditors will suffer a defeat of expectations if assets are removed abroad to be administered according to a foreign system of insolvency law. This point was already considered above. The only practical solution is to allow a local, secondary bankruptcy to be opened so that assets located in a jurisdiction where such creditors' expectations are established can be administered according to the provisions of the local law. Although this compromises the doctrine of unity, it need not result in the total abnegation of the principle of equality among creditors of equal rank. Provided that in the secondary bankruptcy the claims that are lodged in the main proceedings can also be introduced and ranked for dividend alongside those of local creditors, an arithmetical equality should be attainable. By making provisions to that effect (article 20, together with article 5), the Istanbul Convention offers some hope that full-blown ring-fencing can be averted. But states that

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18. Istanbul Convention of June 5, 1990, *infra* note 19 (Council of Europe). For the text, see 1 (INSOL) INT'L INSOLVENCY REV. at 233 (1991) (English version), and at 249 (French version), with *Introductory Note* by P. Winship at 223–32. The English text is also published in CROSS-BORDER INSOLVENCY: COMPARATIVE DIMENSIONS (THE ABERYSTWYTH INSOLVENCY PAPERS), *supra* note 5, app. II, and INTERNATIONAL ASPECTS OF BANKRUPTCY 41 (Council of Europe Press 1991).

19. European Convention on Certain International Aspects of Bankruptcy, June 5, 1990 (also known as the Istanbul Convention of June 5, 1990), *supra* note 18, art. 34.

20. *Id.* art. 40 (permitting ratifying states to make reservations disapplying either ch. II or ch. III of the Convention).

21. *Id.* art. 8.

exclude the terms of chapter II, which addresses the liquidator's exercise of powers abroad, and chapter III, which handles secondary bankruptcies, apparently retain the option to engage in ring-fencing at any time.

Another vital matter that may impair the effectiveness of the Istanbul Convention concerns the provisions relating to the exercise of jurisdiction by the state where proceedings are opened. Recognition of the liquidator's appointment and his entitlement to exercise powers abroad depends upon fulfillment of the jurisdictional criteria specified in article 4. To work properly, this will entail clear, unambiguous, and above all, uniformly applied notions of what these criteria amount to in actual circumstances. The terms employed in the Convention to designate primary and secondary jurisdictional competence are "the State in which the debtor has his centre of main interests" and "the State in whose territory the debtor has an establishment." Neither term is free from difficulties as to its meaning and application, and neither one is completely defined by the terms of the Convention itself. For example, would a holiday home in Brittany, or a company-maintained "hospitality apartment" in the Algarve, count as "an establishment"? And if so, would it make any difference if the property was held on leasehold as opposed to freehold terms?

What must be kept in mind is that the Council of Europe has no central Court of Justice with jurisdiction to resolve problems of interpretation of the Istanbul Convention, so divergent national approaches are a serious possibility. For anyone contemplating or involved in insolvency proceedings, having a clear awareness of the legal position at the outset is vital so that no doubts arise as to jurisdictional competence or the law by which the main insolvency proceedings are to be regulated. In light of these concerns, some reservation is surely justified at this stage as to the Convention's prospects of success.

One notable consequence of the opening for signature of the Istanbul Convention seems to have been a revitalization of the moribund project for a European Community Convention on Insolvency Proceedings. Work on a new draft commenced during 1990 and has proceeded briskly, albeit under the now customary veil of secrecy, which forestalls open debate until the text is too far advanced for any genuine scope for amendment. What is already clear is that the new Community model will be less ambitious in its overall scope and provisions than was the previous EC draft, and that it consists of an amalgam of provisions, some of which are derived from the former draft, others from the Istanbul Convention, and others being totally new.

At first sight, the jurisdictional criteria appear to follow closely those implanted in the Istanbul Convention: primary jurisdiction is enjoyed by the state in which is situated "the centre of the debtor's main interests." If no such center exists in any of the contracting states, a secondary, and purely territorial, jurisdiction is exercisable on the basis that the debtor possesses an establishment or other assets in the territory of the state in question. The inclusion of a "presence of assets" test may lend itself to an exorbitant exercise of jurisdiction based on purely nominal assets (such as the notorious "lost umbrella" left behind by a tourist),[22] but this is negated by the confinement of the scope of such proceedings to the assets situated in that state. Moreover, although the same problems of definition arise as under the Istanbul Convention, these can be resolved under the Community Convention by means of a procedure for obtaining a unifying interpretation from the European Court of Justice.

What does need to be appreciated about jurisdictional provisions is that the Community Convention employs rules of direct jurisdiction, whereas the Istanbul Convention contains rules of indirect jurisdiction. The latter type merely specify under what circumstances an officeholder's appointment will carry with it the right to exercise powers in the other jurisdictions. The contracting states remain free to exercise a more widely based jurisdiction, and such cases simply fall outside the scope of the Convention's provisions. In a direct convention, such as the EC Draft, a uniform set of rules for exercise of insolvency jurisdiction is laid down and must be followed by the courts of all Member States.[23] Thus, preexisting national rules on jurisdiction are supplanted.

The cogent force of Community law is further demonstrated by the inability of Member States to opt out of any chapters of the Convention. Liquidators will therefore be able to exercise their powers in all other parts of the Community. Thus, the principle of universality of insolvency is being promoted, so far as the Community's writ can run. The possibility for a parallel, secondary bankruptcy to be opened is also not an option under the Community Convention. This is realistic under prevailing circumstances, and (as in the Istanbul model) the secondary bankruptcy is prevented from becoming a vehicle for ring-fencing in favor of local, nonpreferential creditors by the provision that all claims are capable of being lodged for inclusion in both sets of proceedings (draft article 25). Thus, the impractical notion of "unity of bankruptcy" has been discarded. Unitary proceedings remain a possibility, but are not obligatory when the logic of the situation, and the requirements of fairness, militate in favor of plural, but properly coordinated, administrations.

A reasonably workable and useful Community Convention may emerge and come into operation in the fairly near future. It will not supply a complete answer to all the problems, of course, because the challenge still remains of how to tie in with the rest of the world states not members of the EC. The new model convention

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22. This (possibly anecdotal) example of the phenomenon known as "exorbitant jurisdiction" is based upon the provision contained in art. 23 of the German Zivilprozessordnung (ZPO), among others. *See* Kurt Nadelmann, *Jurisdictionally Improper Fora, in* CONFLICT OF LAWS: INTERNATIONAL AND INTERSTATE 222 (1972); 2 ALBERT EHRENZWEIG, PRIVATE INTERNATIONAL LAW 25 *et seq.* (1973).

23. In this respect, the EC Bankruptcy Convention will embody the same approach as that of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (also known as The Brussels Convention), Sept. 27, 1968, 1969 E.C. BULL. SUPP. 2, at 17. Title II of this document contains rules of direct jurisdiction.

certainly avoids the crudely aggressive attitude towards non-Member States that so disfigured its predecessor. However, the text could conceivably go further than it presently does by providing positive directions on how cooperation is to take place with the outer world. Whether or not this omission is rectified before the Convention is finalized, the Member States, including the United Kingdom, must seriously and urgently address the question of the provision to be made within national laws to facilitate cooperation in international insolvency cases.

C. AUTHORIZED JUDICIAL ACTIVISM

If states are to respond adequately to the challenges of the pan-global insolvencies that have become such a feature of our time, something more flexible than a multilateral treaty is needed, and above all, it is needed now. The world has seen how many decades can elapse during the gestation of even a quite basic, "pick-and-mix" Convention like that of Istanbul, negotiated within a regional organization. A far longer time scale would be needed to conclude any sort of interregional convention, and even then it would not cover all the possible countries in which assets could be situated. What is to be done?

The most promising solution, in terms of the yield of worthwhile results in return for the effort invested, lies through individual states taking the simple step of enacting clear, liberally drafted provisions conferring upon their own courts an ample range of powers with which to respond to requests for assistance from overseas. Provided the courts are given clear direction as to the spirit and policy with which to respond to such requests, the overall record from previous case decisions indicates that judicial resourcefulness can be harnessed successfully to promote fair and reasonable solutions. The innovation concocted between the courts of the United Kingdom and the United States in the *Maxwell Communications* case, involving a fusion of the U.S. chapter 11 bankruptcy procedure with the U.K. administration order procedure,[24] and the intricate chain of mutually supportive decisions in BCCI,[25] are examples of what can be achieved between independent courts in separate states when inspired to work towards a common goal.

The most obvious candidate for serious consideration is the widely acclaimed section 304 of the U.S. Bankruptcy Code, first introduced in 1978.[26] At that

24. *See* Re Maxwell Communications Corporation plc, Barclays Bank plc v. Homan, [1992] British Company Cases 757 (C.A.); Petition of Brierley, 145 B.R. 151 (Bankr. S.D.N.Y. 1992). For the two types of procedure referred to, see title 11 of the United States Code, *infra* note 26 (Reorganization) and the United Kingdom Insolvency Act 1986 part II (Administration Orders) (available in 4 HALSBURY'S STATUTES 717, 736 (1991).

25. *See supra* text accompanying note 11 and following.

26. Bankruptcy Reform Act of 1978, 11 U.S.C.S. § 304 (Law. Co-op 1982). For discussions of the section, including surveys of the case law and copious literature it has generated, see Gitlin, Flaschen & Grimes, *in* JOSEPH J. NORTON, BANKRUPTCY LAW AND PRACTICE ch. 19 (1989) *reprinted in* CROSS-BORDER INSOLVENCY: COMPARATIVE DIMENSIONS (THE ABERYSTWYTH INSOLVENCY PAPERS), *supra* note 5, ch. 4(b); *see also* P.J. Kozyris *in* CROSS-BORDER INSOLVENCY: NATIONAL AND COMPARATIVE STUDIES, *supra* note 6, ch. 13.

date, as now, the United States was not a party to any international insolvency conventions. In enacting section 304, nevertheless, the United States broke new ground by adopting a universalist approach through unilateral initiative. At the same time it extended a challenge-cum-invitation to other states to take a similar, imaginative leap forward.

Section 304 enables the commencement in a U.S. bankruptcy court of a "case ancillary to a foreign proceeding," opened by the simple step of filing a petition by a "foreign representative." The terms "foreign proceeding" and "foreign representative" are defined elsewhere in the code[27] in fairly liberal terms, so as to accord standing to an officeholder appointed in a jurisdiction with which the debtor has some "substantial connection." A qualifying restriction, however, is the requirement that the foreign proceedings must be supervised by some kind of court or administrative agency. This appears to exclude an administrative receiver appointed by an individual creditor pursuant to a floating charge, as can occur under the law of the United Kingdom and other countries that have developed the same type of security device.

The wide range of assistance available under section 304 is set out with clarity in subsection (b). It includes injunctions to protect the person or property of the debtor from any type of action or remedy in the United States, such as the turnover of assets to the foreign representative and "other appropriate relief." Section 304 contains no requirement for any preexisting, international arrangements in place between the United States and the other state. An "open door" policy is thus proclaimed. However, subsection (c) does render the process of assistance a matter for the court's discretion, to be exercised with regard to "what will best assure an economical and expeditious administration" of the estate. The subsection supplies the court with a six-point checklist of criteria to which regard is to be paid. Among these is the proposition in paragraph (4), which is the basis for the so-called "substantial similarity" doctrine, whereby the U.S. court appraises the effects that take place under the foreign law's process of distributing the estate by comparison with the goals pursued by the U.S. bankruptcy model itself. The emphasis is upon similarity, not identity, of substance.

The supreme merits of section 304 are its flexibility, combined with worldwide adaptability: assistance can be tailored to suit the requirements of the instant case. However, adoption of comparable measures for the United Kingdom requires additional consideration of the "hybrid" model put together by the Australian Law Reform Commission in its Insolvency Report of 1988 (currently under consideration for enactment).[28] This model closely resembles the U.S. section 304, but has additional elements drawn from section 426 of the Insolvency Act

27. 11 U.S.C.S. § 101(22), (23).

28. Austl. L. Reform Commission, Report No. 45, General Insolvency Inquiry (1988). Substantial parts of the report's recommendations, but not those on Cross-Border Insolvency, were adopted in the Australian Corporate Law Reform Bill of 1992.

of 1986 of the United Kingdom. This results in a two-tier approach to cooperation in which judicial assistance becomes available as of right in cases where the request originates from a prescribed country—that is to say, a country with which Australia has well-established legal relations, such as the United Kingdom, Canada, and New Zealand. Other countries could be added from time to time, just as is possible in the United Kingdom under section 426. In all other cases the Australian court's cooperation would be available on a discretionary basis, following the principles embodied in U.S. section 304. The request for assistance may be made by the officeholder personally, although formal letters of request from the foreign court may also be employed. The Australian provision is so worded that, unlike that of the U.S. section 304, assistance can be sought by a receiver appointed by a creditor acting under a floating charge. This composite model, which seems to offer the best of both worlds, is highly attractive. Other states should adopt a similar legislative provision to reaffirm and strengthen the commitment to international cooperation between courts.

III. Conclusion

Solutions to the profound and complex legal problems of international insolvency are not easy. Where appropriate conditions exist, as within a convergent regional grouping of states such as the European Community, it may be possible to develop a multilateral approach to some of the main difficulties, such as exercise of jurisdiction, and the capability of the liquidator to act in other states and administer assets that are located there. But such developments will inevitably be slow to evolve and will only be applicable to assets that happen to be somewhere within the frontiers of the regional organization at the time when insolvency proceedings occur. Any multilateral agreement or treaty should therefore respect the need to provide for fair and even-handed cooperation with courts and officeholders from countries outside the grouping of contracting states.

Whenever an insolvency transcends the confines of a single global region or legal "family," the complexity of the issues increases. The most positive results, for the foreseeable future, are likely to be attained by conferring upon national courts a mandate, and a discretionary power, to act in collaboration with their overseas counterparts. The mandate should allow national courts to assist officeholders in proceedings commenced in other jurisdictions in whatever ways appear possible in the circumstances of the instant case, having regard for the diverse interests that will be affected. This places a heavy premium upon judicial skills and powers of discernment. However, signs are increasing that the judiciary in many parts of the world are both conscious of the attendant responsibilities and willing to serve the ends of justice by exercising their powers in a creative and internationalist spirit. By supporting, and enhancing the scope of, judicial activism in international insolvency, improvement in the concrete outcome of cases in the immediate and medium-term future may be significant.